No. 93-1543

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE MCKENNON,
Petitioner,
v.
NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE EMPLOYERS GROUP, THE MICHIGAN MANUFACTURERS ASSOCIATION, THE NEWSPAPER ASSOCIATION OF AMERICA, AND THE NEWSPAPER PERSONNEL RELATIONS ASSOCIATION IN SUPPORT OF RESPONDENT

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE EMPLOYERS GROUP, THE MICHIGAN MANUFACTURERS ASSOCIATION, THE NEWSPAPER ASSOCIATION OF AMERICA, AND THE NEWSPAPER PERSONNEL RELATIONS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council, The Employers Group, the Michigan Manufacturers Association, the Newspaper Association of America, and the Newspaper Personnel Relations Association respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of Respondent in this case.

The written consent of Respondent Nashville Banner Publishing Co. has been filed with the Clerk of the Court. Although Respondent granted consent to five *amicus*

curiae briefs supporting Petitioner's position, Petitioner has not responded to our written request to file this brief.

In support of their motion, the *amici* by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. The five *amici* herein are associations representing private sector employers firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The Equal Employment Advisory Council (EEAC) is a voluntary association of nearly 300 private sector employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

3. The Employers Group, formerly known as the Merchants & Manufacturers Association, is the largest association of California employers, with over 5,000 employer members employing an aggregate of more than 2.5 million California employees.

4. The Michigan Manufacturers Association is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, to promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and to otherwise promote the general business and economic welfare of the State of Michigan.

5. The Newspaper Association of America is a nonprofit corporation serving approximately 1,350 newspapers in the United States and Canada.

6. The Newspaper Personnel Relations Association (NPRA) is a non-profit professional association of approximately 370 human resource professionals representing the interests of more than 1,000 daily newspapers nationwide. NPRA is a professional emphasis group of the Society for Human Resource Management, which has a membership of more than 60,000 human resource professionals nationwide.

7. All of the *amici's* members, and the constituents of EEAC's association members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-related claims, the *amici's* members are interested in whether employees who falsify their credentials before being hired, or engage in active misconduct after being hired, should have their claims of employment discrimination dismissed at summary judgment or be able to recover any remedy.

8. Thus, the issue presented is extremely important to the nationwide constituencies that the *amici* represent. The Sixth Circuit below, applying the "after-acquired evidence doctrine," affirmed summary judgment in favor of Respondent because discovery revealed that Petitioner, a confidential secretary to the Banner's comptroller, had, without approval, copied, removed, and disseminated numerous confidential documents.

9. The *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. As employers, the constituent members that the *amici* represent have been or are likely to be involved in litigation where a claimant has been shown to have been engaged in misconduct that either would have resulted in the claimant's not being hired or in being discharged pursuant to established company policy. Numerous lower courts either have dismissed such suits

or have greatly limited the remedy available to the claimant. The legal and policy arguments supporting these decisions are set forth in the attached brief.

10. Indeed, because of their significant experience in these matters, the *amici* are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties. The *amici* also rely on this experience and expertise to respond to the arguments of several *amici* and the Solicitor General whose briefs support Petitioner, particularly their unsupported arguments that the after-acquired evidence doctrine will undercut the commitment of employers to eliminate unlawful workforce discrimination.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, The Employers Group, the Michigan Manufacturers Association, the Newspaper Association of America, and the Newspaper Personnel Relations Association respectfully request that the Court grant them leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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September 8, 1994

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE EMPLOYERS GROUP, THE MICHIGAN MANUFACTURERS ASSOCIATION, THE NEWSPAPER ASSOCIATION OF AMERICA, AND THE NEWSPAPER PERSONNEL RELATIONS ASSOCIATION IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council, The Employers Group, the Michigan Manufacturers Association, the Newspaper Association of America and the Newspaper Personnel Relations Association respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave. The brief urges the Court to affirm the decision below, and thus supports the position of Respondent Nashville Banner Publishing Company before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 290 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 350 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in numerous cases before this Court involving the proper interpretation of the ADEA.[1] In addition, EEAC has filed briefs in several cases before the Courts of Appeals involving the after-acquired evidence doctrine.[2]

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[1] *E.g., Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (standard of proof for recovery of liquidated damages); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrability); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (effect of state agency "no cause" finding); *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (application to employee benefits); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (class actions); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (standard for liquidated damages).

[2] In addition to filing a brief before the Sixth Circuit below in the instant case, EEAC has filed briefs in *Redd v. Fisher Controls*, No. 92-8702 (5th Cir. August 29, 1994) (issue not reached); *Manard v. Fort Howard Corp.*, No. 92-7100 (10th Cir.) (decision pending); *O'Day v. McDonnell Douglas Helicopter Co.*, No. 92-15625 (9th Cir.) (decision pending); *Russell v. Microdyne Corporation*, Nos. 93-1895 and 93-2078 (4th Cir.) (decision pending); and *Schnidrig v. Columbia Machine, Inc.*, No. 93-35770 (9th Cir.) (decision pending).

The Employers Group, formerly known as the Merchants & Manufacturers Association, is the largest association of California employers, with over 5,000 employer members employing an aggregate of more than 2.5 million California employees.

The Michigan Manufacturers Association (MMA) is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, to promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and to otherwise promote the general business and economic welfare of the State of Michigan. A significant aspect of MMA's activities is representing the interests of its member-employers in employment and labor relations matters before the courts, Congress, Michigan Legislature and state agencies.[3] MMA appears before this Court as a representative of more than 2,900 private business concerns employing over one million employees, many of whom are substantially affected by the issues in the case presently before the Court. MMA represents the interests of its members through various means, including through appearances as *amicus curiae* in cases of great concern. MMA also is an employer and has an interest in this case

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[3] MMA has filed briefs with this Court in *Chrysler Corporation, et al. v. Smolarek, et al.*, 879 F.2d 1326 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) (whether § 301 of the Labor Management Relations Act preempted claims under Michigan's Handicappers' Civil Rights Act) and *General Motors Corporation v. Romein* and *Ford Motor Company v. Gonzales*, 112 S. Ct. 1105 (1992) (retroactive application of an amendment to the Workers' Disability Compensation Act in Michigan).

both as an employer and as a representative of employers affected by these issues.

The Newspaper Association of America is a non-profit corporation serving approximately 1,350 newspapers in the United States and Canada. The majority of these members are daily newspapers that account for more than 85 percent of the daily circulation in the United States. Many non-daily newspapers also are members of NAA®.

The Newspaper Personnel Relations Association is a non-profit professional association of approximately 370 human resource professionals representing the interests of more than 1,000 daily newspapers nationwide and is a professional emphasis group of the Society for Human Resource Management, with a membership of more than 60,000 human resource professionals nationwide.

All of the *amici*'s members, and the constituents of EEAC's association members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-related claims, the *amici*'s members are interested in whether employees who engage in active misconduct can recover on such claims.

Thus, the issue presented is extremely important to the nationwide constituencies that the *amici* represent. Mrs. McKennon claims that Nashville Banner Publishing Company ("the Banner") discharged her because of her age in violation of the ADEA. The district court granted summary judgment in favor of the Banner, because discovery revealed that Mrs. McKennon, a confidential secretary to the Banner's comptroller, had, without approval, copied, removed and disseminated numerous confidential documents. The Sixth Circuit affirmed. Unrebutted evidence showed that Mrs. McKennon would have been fired for her misconduct had the Banner known of it before

her termination. The courts below ruled correctly that the after-acquired evidence against Mrs. McKennon precluded any recovery on her discrimination claim.

Thus, the *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their significant experience in these matters, the *amici* are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The Nashville Banner Publishing Company ("the Banner") employed Christine McKennon primarily as a secretary. Pet. App. 2a.[4] Beginning in 1989, Mrs. McKennon was a confidential secretary to the Comptroller, where she was privy to numerous confidential matters, including personnel and financial files and documents. Pet. App. 11a. Mrs. McKennon's employment was terminated in 1990, according to the Banner, as part of a workforce reduction. *Id.* Mrs. McKennon, then age 62, filed suit against the Banner under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and a similar state statute, claiming that her termination was because of her age. *Id.*

During discovery in the case, the Banner learned that, during her tenure as the Comptroller's secretary, Mrs. McKennon had copied and removed numerous confidential documents, including a payroll ledger, a current profit and loss statement, and several notes and memoranda. *Id.* She had taken the documents home and shown them to

[4] The decision of the Sixth Circuit below is reported at 9 F.3d 539, and is reproduced at pages 1a-9a of the Appendix to the Petition for a Writ of Certiorari as Pet. App. 1a-9a. The decision of the U.S. District Court for the Middle District of Tennessee, Nashville Division, is reported at 797 F. Supp. 604, and is reproduced at pages 10a-18a of the Appendix. They are cited herein as Pet. App. ——.

her husband. *Id.* Mrs. McKennon contends that "she copied and removed the documents for her 'insurance' and 'protection,' 'in an attempt to learn information regarding my job security concerns.' " Pet. App. 12a.

The district court found that "Mrs. McKennon's copying and removal of the confidential documents constituted misconduct, which was in violation of her obligations as a confidential secretary." Pet. App. 13a. Undisputed evidence, an affidavit from the Banner's president, shows that Mrs. McKennon would have been terminated immediately had the Banner learned of her misconduct prior to her discharge. Pet. App. 2a-3a.

The "after-acquired evidence doctrine," adopted by the Sixth, Seventh, and Tenth Circuit Courts of Appeals, bars, in appropriate cases, recovery by a discrimination claimant who engages in conduct that would have resulted in dismissal. *Milligan-Jensen v. Michigan Technological University*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Washington v. Lake County, Illinois*, 969 F.2d 250 (7th Cir. 1992); *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728); *Summers v. State Farm Mut. Auto Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).[5] The district court granted the Banner's motion for summary judgment based on the after-acquired evidence doctrine, Pet. App. 18a, and the Sixth Circuit affirmed. Pet. App. 9a. This Court has granted McKennon's petition for a writ of certiorari to the Sixth Circuit.

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[5] *See also Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984) (disqualification for employment and thus for backpay can be established by after-acquired evidence). *But see Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) (holding that after-acquired evidence is relevant to the relief due a successful discrimination plaintiff although declining to impose an absolute bar).

SUMMARY OF ARGUMENT

Where an employer shows that a discrimination plaintiff would have been terminated for on-the-job misconduct, there can be no recovery on the discrimination claim, even though the evidence of misconduct was acquired after the alleged discriminatory act. A discrimination claimant is not entitled to be placed in a better position than if the discrimination had not occurrred. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977); *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). Thus, where the claimant would have been discharged regardless of whether or not discriminatory conduct occurred, the claimant is not entitled to a remedy, and summary judgment is appropriate.

The *Mt. Healthy* analysis applies even though the information that would have led to termination was acquired by the employer after the alleged discrimination took place. *Smallwood v. United Air Lines*, 728 F.2d 614, 623 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984). Accordingly, if an employer can show that an employee would have been fired had the employer known of his on-the-job misconduct, the employee cannot recover on a discrimination claim, and summary judgment is appropriate. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Milligan-Jensen v. Michigan Tech.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992). Any other result, such as awarding backpay for a period of time before the wrongdoing was discovered, would only reward the plaintiff for successfully concealing the misconduct from the employer.

The arguments advanced by the Solicitor General should be given no deference and should not be adopted by this Court. The government has been inconsistent; it previously *embraced* the after-acquired evidence doctrine

as barring all remedies in appropriate cases. Also, the policy advocated by the agency in effect rewards those who successfully conceal their misconduct.

ARGUMENT

I. THE COURT SHOULD ADOPT A RULE, CONSISTENT WITH ITS DECISION IN *MT. HEALTHY SCHOOL DISTRICT BOARD OF EDUCATION v. DOYLE*, THAT BECAUSE EVEN A SUCCESSFUL DISCRIMINATION CLAIMANT MAY NOT BE PLACED IN A BETTER POSITION THAN IF THE DISCRIMINATION HAD NOT OCCURRED, AN EMPLOYEE WHO WOULD HAVE BEEN DISCHARGED FOR REASONS OTHER THAN A DISCRIMINATORY REASON IS NOT ENTITLED TO A REMEDY, EVEN THOUGH THE ALTERNATIVE REASON CAME TO LIGHT AFTER THE ALLEGED DISCRIMINATORY DECISION. THE SUMMARY JUDGMENT RENDERED BELOW SHOULD BE AFFIRMED.

As shown below, the Sixth Circuit correctly granted summary judgment because the unrebutted evidence that the Banner would have terminated Mrs. McKennon had it known of her misconduct compelled judgment in favor of the Banner on Mrs. McKennon's discrimination claim. Applying its prior decision in *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992), which relied on *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), which in turn relied on this Court's decision in *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the Sixth Circuit reached the correct result—that because she would have been fired had the Banner known of her theft and dissemination of sensitive company documents, Mrs. McKennon takes nothing on her discrimination claim. This Court's clear precedent requires affirmance of the decision below.

A. Even a Successful Discrimination Claimant May Not Properly Be Placed in a Better Position Than If the Discrimination Had Not Occurred.

No matter what the employment action in question, the ultimate aim of an employment discrimination remedy under either Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination in employment on the basis of race, sex, color, religion or national origin,[6] the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, or the Americans with Disabilities Act, 29 U.S.C. § 12101 *et seq.*, is to place the plaintiff in the position he or she would have been in had the employer not engaged in any discriminatory conduct. Therefore, where the employer can show that it would have taken the same action, even in the absence of any discrimination, no remedies are available and summary judgment is appropriate.

This Court's *Mt. Healthy* decision established the framework for this result. In *Mt. Healthy*, a school district refused to renew a teacher's contract because he had told a local radio station about a new teacher dress code and because of an incident in which he had made obscene gestures. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282-83 (1977). The lower court concluded that the statement to the radio station was protected by the First and Fourteenth Amendments and ordered reinstatement and backpay. This Court reversed, holding that even if the protected conduct played a "substantial part" in the board's decision, the teacher still may not be entitled to a remedy. *Id.* at 285. As the Court explained:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he

[6] 42 U.S.C. § 2000e-2(a).

> would have occupied had he done nothing . . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But, that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 285-86. In so holding, the Court established the general principle, applicable in several contexts, that if the outcome would have been the same regardless of presence or absence of discriminatory conduct, the plaintiff needs no remedial action to place him in the position he would have been in had no discriminatory conduct occurred.

The *Mt. Healthy* principle is equally applicable to employment discrimination cases. *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). "Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise." *Id.* (citing *Mt. Healthy*, 429 U.S. at 285-87). Accordingly, even if a plaintiff has succeeded in raising a presumption that an adverse employment action was taken for a discriminatory reason, "[t]he defendant may rebut this presumption by showing by a preponderance of the evidence that the adverse action would have been taken even in the absence of discriminatory or retaliatory intent." *Id.* (citing *Mt. Healthy*, 429 U.S. at 287).

B. The *Mt. Healthy* Principle Is Applicable Even Though the Outcome Depends Upon After-acquired Evidence.

In *Smallwood v. United Air Lines*, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984), the Fourth Circuit clarified that the *Mt. Healthy* analysis applies whether or not the information that would have led to the same result was actually in the employer's possession at the time of the alleged discriminatory action. *Smallwood* involved a pilot who was rejected for employment because he was 48 years of age when the company only processed applications of those 35 and under. Although the Fourth Circuit rejected United's defense that age was a *bona fide* occupational qualification,[7] it concluded that United would not have hired Smallwood even absent age discrimination, and thus dismissed Smallwood's claim for processing of his application and for backpay. *Smallwood*, 728 F.2d at 627.

The evidence that would have led United not to hire Smallwood was not in United's possession at the time it rejected his application. United learned later that Smallwood had been terminated by his previous employer for serious misconduct. *Id.* at 621-22.[8] The district court, however, had given this after-acquired evidence short shrift, expressing doubt that it was admissible at all and finding a "duty . . . to view it with skepticism." *Id.* at 623.

Criticizing the district court's dismissal of the after-acquired evidence as "a reason that is completely contrary to the bellwether case in this area of *Mt. Healthy*," *id.*, the Fourth Circuit concluded that "[i]n short, the Supreme

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[7] *Smallwood v. United Air Lines*, 661 F.2d 303 (4th Cir. 1981).

[8] The report of the Referee in Smallwood's discharge proceeding indicated that he had (1) provided false information to collect moving expenses to which he was not actually entitled and (2) impermissibly charged airfare for his children to his company credit card. 728 F.2d at 620-22.

Court instructed district courts in cases where the issue is such as here that they '*should*' proceed to make the 'after-the-fact rationale' which the district court in this case deprecates." *Id.* (emphasis in original). Accordingly, the court ruled:

> the disqualification for employment and thus for back-pay, based on a "recreating [of] the circumstances that would have existed but for the illegal discrimination" may be established by evidence which had not been developed at the time the claimant was denied employment . . . .

Id. at 624 (quoting *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982)). Based on United's unrebutted evidence that it would not have hired Smallwood had it known the truth, the Fourth Circuit dismissed the case. *Id.* at 627.[9] Accordingly, using after-acquired evidence to reconstruct the situation is consistent with *Mt. Healthy's* mandate that the plaintiff be placed in no better position than if the alleged unlawful action had not occurred. "[T]here is nothing unusual in a court resolving what a party to litigation would or should have done under certain circumstances. It is done repeatedly in tort cases." *Smallwood*, 728 F.2d at 623.

Based on this reasoning, several Courts of Appeals have concluded that after-acquired evidence of on-the-job misconduct bars all relief under the anti-discrimination statutes. The "after-acquired evidence doctrine," as it is now known, first took shape in a case factually similar to this, wherein the Tenth Circuit in 1988 applied *Mt. Healthy* and *Smallwood* to conclude that after-acquired evidence of

[9] The Solicitor General incorrectly argues that the employer's burden of proof in these cases is governed by the "clear and convincing evidence" standard. Brief of Solicitor General at 24 and n.16. This Court has rejected the use of that standard for most civil litigation and made clear that "preponderance of the evidence" is the appropriate test. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-255 (1989).

on-the-job misconduct that would have led to the plaintiff's termination bars any relief. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).

Summers, who was terminated from his position for falsifying records and poor performance, charged that he was fired because of his age and religion. *Id.* at 702. Summers had been warned repeatedly that falsification of documents would result in discharge. During trial preparation in the case, State Farm learned that Summers had falsified records in numerous other instances. *Id.* at 703. The court ruled that "while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief or remedy to Summers." *Id.* at 708. Numerous district courts also have denied relief based on after-acquired evidence of on-the job misconduct.[10]

The after-acquired evidence doctrine similarly has been adopted for use in cases involving "résumé fraud," where the plaintiff has made a material misstatement or omission on his or her job application documents. *See, e.g., Welch v. Liberty Machine Works*, 23 F.3d 1403 (8th Cir. 1994) (adopting doctrine but concluding that employer had not sufficiently established that it would not have hired the employee had it known of the misrepresentation); *O'Driscoll v. Hercules*, 12 F.3d 176 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 4, 1994) (No. 93-1728); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) (framing issue as whether the plaintiff

[10] *See, e.g., O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), *appeal docketed*, No. 92-15625 (9th Cir.); *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992).

would have been fired, not whether he would have been hired, had the employer known of the falsification).[11] Numerous district courts also have denied relief based on *Summers* where the plaintiff provided false information in the application process.[12]

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[11] Panels of the Third and Eleventh Circuits have taken a different approach to application of the *Mt. Healthy* doctrine in a termination case where the after-acquired evidence was of falsified information on the employment application. *Mardell v. Harleysville Life Insurance Company*, No. 93-3258, 1994 U.S. App. LEXIS 19884 (3d Cir. 1994); *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992). Both of these courts agreed with *Summers* that after-acquired evidence may be relevant to the remedies due the plaintiff in a discrimination case. Nevertheless, they declined to hold that the plaintiffs were entitled to *no* remedy, concluding instead that a plaintiff should receive backpay where the employer would never have discovered the plaintiff's application fraud had it not surfaced in the litigation. *Id.*

As discussed below, this approach rewards a plaintiff who successfully conceals fraud or misconduct, and indeed encourages attempts to keep such conduct secret. As the dissenting judge in *Wallace* pointed out, it enables the plaintiff to "take advantage of her own misdeeds and convert her spurious statements into a shield against the employer." *Id.* at 1189 (Godbold, J., dissenting). For this reason, we believe that the Fourth, Sixth, Seventh, Eighth and Tenth Circuits' approach is the better one.

[12] *See, e.g., Agbor v. Mountain Fuel Supp. Co.*, 810 F. Supp. 1247 (D. Utah 1993) (denying any remedy in case alleging discriminatory denial of promotion); *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993) (no relief in case alleging discriminatory layoff, promotion and training); *Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D. Va. 1993) (denying any remedy in case alleging sex discrimination, sexual harassment and retaliation), *appeal docketed*, Nos. 93-1895 and 93-2078 (4th Cir.); *Kravit v. Delta Airlines*, 60 Fair Empl. Prac. Cas. (BNA) 994 (E.D.N.Y. 1992) (no state law remedy available for rejected applicant who falsified application); *Benson v. Quanex Corp.*, 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992) (granting summary judgment in race discrimination and harassment case); *Grzenia v. Interspec*, No. 91 C 20, 1991 U.S. Dist. LEXIS 15093 (N.D. Ill. Oct. 21, 1991) (granting summary judgment in ADEA case); *Churchman v. Pinkerton's*, 756 F. Supp. 515 (D. Kan. 1991) (granting summary judgment where plaintiff claimed constructive discharge as a result of sexual harassment); *Sweeney v. U-Haul Co. of Chicago*, 55 Fair Empl. Prac. Cas. (BNA) 1257 (N.D. Ill. 1991) (granting summary judgment in race discrimination case); *Livingston v. Sorg Printing Co.*, 49 Fair Empl. Prac. Cas. (BNA) 1417 (S.D.N.Y. 1989) (granting summary judgment against race discrimination claimant). *But see Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993) (adopting Eleventh Circuit rule and allowing retroactive but not prospective relief); *Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333 (S.D.N.Y. 1993) (denying summary judgment due to genuine issues of material fact); *Benitez v. Portland Gen. Electric*, 58 Fair Empl. Prac. Cas. (BNA) 1130 (D. Or. 1992) (refusing to follow *Summers* at summary judgment stage due to lack of Ninth Circuit precedent).

The decision by a plurality of this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), does not preclude the use of after-acquired evidence. The Solicitor General's brief argues that the plurality opinion in *Price Waterhouse* imparted a temporal qualification to mixed motive cases, stating that "An employer may not . . . prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." 490 U.S. at 252. But *Price Waterhouse* did not involve discovery of earlier misdeeds by the plaintiff that would have justified her discharge if known to the employer had those misdeeds not been concealed by the plaintiff.

The after-acquired evidence doctrine does not, moreover, involve a mixed motive analysis, nor does it affect a finding of liability. On the contrary, the after-acquired evidence doctrine *assumes* liability on the part of the employer, but recognizes that evidence discovered later affects the remedies due to the employee if the employee's misconduct was sufficiently serious that the employee would not have been hired, or would have been discharged, had this misconduct been known by the employer. *See Summers*, 864 F.2d at 708 ("[W]hile such after-acquired evidence cannot be said to have been a

'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief to Summers."). Where an employee would have been terminated had the employer known the truth, application of the *Mt. Healthy* principle requires that the employee be placed in *no better* position as a result of having brought a discrimination claim.[13]

Even if the *Price Waterhouse* rationale were applicable, however, it would not help Petitioner. The decision was a "mixed motive" case that dealt with the issue of liability, holding that "once a plaintiff in a Title VII case shows that [a protected characteristic] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the protected characteristic] to play such a role." *Id.* at 244-45. The after-acquired evidence doctrine deals with whether a plaintiff who is shown to have committed an offense that would have resulted in not being hired or in being terminated can recover any remedy. *See O'Day*, 784 F. Supp. at 1469 (D. Ariz. 1992) (distinguishing *Price Waterhouse*); *Punahele v. United Air Lines*, 756 F. Supp. 487, 490 (D. Colo. 1991) (same).

In either situation, the case should be dismissed if the employer can prove it had a legitimate reason for discharging the plaintiff. Where, as here, the plaintiff has

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[13] Indeed, even those courts that *reject Summers* agree that while after-acquired evidence has no bearing on liability, it can be relied upon to limit the available remedies. *See Wallace v. Dunn Construction Company, Inc.*, 968 F.2d 1174, 1181 (11th Cir. 1992); *Mardell v. Harleysville Life Insurance Company*, No. 93-3258, 1994 U.S. App. LEXIS 19884, *54-*55 (3d Cir. 1994); *Equal Employment Opportunity Commission v. Farmer Brothers Company*, Nos. 92-56012, 92-56123, 1994 U.S. App. LEXIS 19788, *27-*28 (9th Cir. 1994) (dicta).

engaged in misconduct that legitimately justifies termination, *Price Waterhouse* would support a decision to dismiss the case.

We urge, therefore, that this Court confirm the after-acquired evidence doctrine as applied by the Fourth, Sixth, Seventh, Eighth and Tenth Circuits.

II. AFTER-ACQUIRED EVIDENCE THAT WOULD HAVE LED TO A CLAIMANT'S DISCHARGE IN ANY EVENT BARS ANY RECOVERY.

Petitioner and the Solicitor General concede that after-acquired evidence of on-the-job misconduct may limit the relief available to the plaintiff in a discrimination case. Brief of Petitioner at 30; Brief of Solicitor General at 10. The narrow issue presented in this case, therefore, is whether after-acquired evidence of misconduct can bar *all* remedies, as found by the Sixth Circuit below as well as the Fourth, Seventh, Eighth and Tenth Circuits, or whether it merely limits available remedies, as concluded by the Eleventh Circuit in *Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) and the Third Circuit in *Mardell v. Harleysville Life Insurance Company*, No. 93-3258, 1994 U.S. App. LEXIS 19884 (3d Cir. 1994).

A. Applicability of the After-Acquired Evidence Doctrine Is Strictly Limited to Cases in Which the Employer Can Show That It Would Have Taken Justifiable Adverse Action Had It Known of the Misconduct.

The *amici* herein take special exception to the unsupported assertion of the Solicitor General that employers will eschew compliance with the law and instead rely on "the after-acquired evidence defense as an invitation 'to establish ludicrously low thresholds for legitimate termination.'" Br. at 17 (quoting *Wallace*, 968 F.2d at

1180). The Solicitor General broadly, yet incorrectly, asserts that "[e]mployers now routinely embark on extensive, post-discharge investigations designed to uncover some theoretically valid post hoc justification for terminating an employee who has brought a claim of unlawful discrimination, instead of conducting the self-examination and correction of unlawful practices that Title VII and the ADEA are designed to require." Br. at 18. This attack unfairly characterizes the approach taken by the circuits that have adopted the doctrine.

These circuits have established exacting standards that must be met by the employer's reason and its proof before the doctrine is deemed to apply in a particular case. After-acquired evidence will not bar recovery unless the employer can show that it indeed would have fired the employee had it known of the misconduct earlier. The Tenth Circuit has articulated the employer's burden of proof as requiring a showing that "(1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct." *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176, 179 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728). The Sixth Circuit below specifically held that the doctrine applies "where the employer can show it would have fired the employee on the basis of the evidence." Pet. App. 6a. In a prior case involving resume fraud, the Sixth Circuit noted explicitly that "[b]ecause [the employer] established that it would not have hired [the plaintiff] and that it would have fired her had it become aware of her resume fraud during her employment, [the plaintiff] is entitled to no relief." *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 415 (6th Cir. 1992).

Other circuits applying the doctrine are similarly strict. In *Kristufek v. Hussman Foodservice Co.*, 985 F.2d

364, (7th Cir. 1993), the Seventh Circuit concluded that the doctrine did not apply because the employer was *unable* to show that it would have terminated the plaintiff's employment had it known of his falsified application information. *Id.* at 370.[14] *See also Washington v. Lake County, Illinois*, 969 F.2d 250 (7th Cir. 1992) (holding that in a "résumé fraud" case, it is insufficient for an employer to show that the employee would not have been *hired*, and specifically requiring a showing that the employee would have been *fired* had the falsification come to light during his employment). Similarly, the Eighth Circuit recently adopted the doctrine in *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994), but declined to apply it, concluding that the employer's proof was insufficient.

Based on these standards, district courts facing this issue *are* holding employers to strict proof that the after-acquired evidence indeed would have resulted in discharge. *See, e.g., Tuohey v. Clark Oil & Refining Corp.*, No. 92 C 8358, 194 U.S. Dist. LEXIS 8102 (N.D. Ill. 1994) (denying summary judgment because employer merely showed that it could have, not that it would have, fired the plaintiff had it known of misstatements on his employment application); *Anderson v. Martin Brower Co.*, No. 93-2333-JWL, 1994 U.S. Dist. LEXIS 9196 (D. Kan. 1994) (denying summary judgment because employer failed to present evidence allowing the court to determine that employee engaged in misconduct under company policy); *Punahele v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991) (denying summary judgment because material fact remained as to whether employer followed its own procedures or would not have hired plaintiff).

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[14] Even in this situation, however, the Seventh Circuit reduced the award of backpay to eliminate any recovery for the period after the falsification was discovered. *Id.* at 371.

As one district court has noted, under *Summers* and its progeny, "[a]n employer must show that misconduct was such that an employee would have been terminated had the employer known of the misconduct before or at the time of termination. *This requirement prevents an employer from combing an employee's file after a discriminatory termination to discover minor, trivial or technical infractions for use in a Summers defense.*" *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659 (D. Utah 1990)(emphasis added) (quoted with approval in *Washington v. Lake County, Ill.*, 969 F.2d 250, 255-56 (7th Cir. 1992)), *aff'd* 12 F.3d 176 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728)).[15]

Accordingly, because of this rigorous standard of proof, the Solicitor General's fear that employers will manufacture minimal standards for discharge is unfounded. Moreover, no employer realistically could expect to run an efficient workforce while routinely terminating employees for ridiculous reasons. An employer who discharged

[15] These standards provide "principled application of standards consistent with . . . [legislative] purposes" (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)) so as to justify a denial of remedy and dismissal of this case. Contrary to the arguments of the Petitioner, the Solicitor General and several supporting *amici*, a remedy to a Title VII plaintiff who has proven a violation is not necessarily available in all cases. Rather, "backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." *Albemarle Paper*, 422 U.S. at 415.

As Title VII's remedial scheme is not mandatory, it is distinguishable from the Federal Employers' Liability Act, 45 U.S.C. § 51, which provides that a common carrier by railroad "shall" be liable for damages to persons injured while employed by such a carrier. *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35 (1961), thus is not relevant to the instant case. Similarly inapplicable are the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 904 ("Every employer 'shall' be liable. . .") and *Newport News Shipbuilding and Dry Dock Co.*, 674 F.2d 248 (4th Cir. 1982).

employees for only slight infractions soon would find itself with no experienced workers, no productivity, no profits, and an abundance of self-inflicted lawsuits. The Solicitor General's contention that employers nationwide are attempting to operate this way because of the after-acquired evidence doctrine is offensive and simply without any factual basis.

B. The After-Acquired Evidence Doctrine Is Consistent With the Court's Recent Decision in *ABF Freight System.*

For a number of reasons, the after-acquired evidence doctrine is consistent with the Court's recent decision in *ABF Freight System v. National Labor Relations Board*, 114 S. Ct. 835 (1994). In that case, unlike here, the employer failed to establish that it would have discharged the individual for a violation of a company policy. Moreover, the Court's sole reason for allowing relief to go forward was deference to an agency with special expertise—a factor not applicable to the ADEA, where all cases are heard before a court or jury.

In *ABF Freight*, the Board found that the employer had violated the Act by discharging several casual dockworkers and then offering to reinstate them if they would waive their right to pursue a grievance filed under the collective bargaining agreement. One of these casual workers, Michael Manso, returned to work, but then filed an unfair labor practice charge concerning the earlier terminations. Thereafter, Manso was discharged on the basis that he had violated the employer's disciplinary rules regarding tardiness.

The employer argued that Manso should not be reinstated because he had lied about the reasons for being late both to the employer and before the administrative law judge (ALJ). The Tenth Circuit enforced the Board's Order reinstating Manso. The court found substantial evidence to support the Board's finding "that ABF did not

meet its burden of showing that Manso would have been discharged in the absence of his protected union activity." *Miera v. National Labor Relations Bd.*, 982 F.2d 441, 446 (10th Cir. 1992), *aff'd sub. nom. ABF Freight System v. National Labor Relations Board*, 114 S. Ct. 835 (1994) (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983)) (employer bears the burden of proving that the employee would have been discharged absent any protected union activity).

This Court agreed that this crucial element was lacking. It noted that "[t]he Board found that the record in this case unequivocally established that ABF did not treat Manso's dishonesty "in and of itself as an independent basis for discharge or any other disciplinary action." 114 S. Ct. at 838 n.5 (citing 304 N.L.R.B. 585, 590 (1991)). The Tenth Circuit had noted that "Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of anti-union animus. . . ." *Id.* at 838 (quoting 982 F.2d at 447). In contrast, after-acquired evidence cases require that the employer had a valid, enforceable company policy that was violated by the plaintiff.

Thus, this Court's ruling in *ABF Freight* was as narrow at the issue presented. The sole reason given for not reversing the Board was that the courts should defer to the administrative agency unless its ruling was "arbitrary, capricious, or manifestly contrary to the statute." 114 S. Ct. at 839. The Court could not say that the Board was obligated to adopt a rigid rule that would foreclose relief in all comparable cases. Although it appeared to be holding its nose in order to defer to the NLRB, the Court clearly discouraged the federal courts from giving sanction to proven misconduct.

Thus, the *ABF Freight* decision forcefully decreed that "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant

affront' to the truthseeking function of an adversary proceeding." *Id.* at 839. None of the numerous cases adopting the after-acquired evidence doctrine were criticized or even cited by the Court, and the *ABF Freight* decision in no way limits the authority of the federal courts to dismiss cases when the employer (unlike ABF Freight) can show that the employee would have been discharged for lying or breaching a valid company disciplinary policy.

Thus, *ABF Freight* closely resembles these cases cited above in which the courts, while recognizing the validity of the after-acquired evidence doctrine, declined to apply it in a particular case because of a failure of the employer's proof. In such a case, the applicability of the doctrine as a complete bar to relief is foreclosed. Nevertheless, the fact of the misconduct remains, and is still relevant to the determination of an appropriate remedy. *Accord Kristufek v. Hussman Foodservice Company*, 985 F.2d 364 (7th Cir. 1993) (holding that employer failed to show that employee would have been fired had the employer known of the falsified educational qualifications, but ordering verdict reduced to deduct damages and attorney's fees for the time following discovery of the falsification).

Indeed, this Court acknowledged in *ABF Freight* that the NLRB could have limited—or even denied—any remedy available to the employee:

> We recognize that the Board might have decided that such misconduct disqualified Manso from profiting from the proceeding, or it might even have adopted a flat rule precluding reinstatement when a former employee so testifies. As the case comes to us, however, the issue is not whether the Board *might* adopt such a rule, but whether it *must* do so.

114 S. Ct. at 839 (emphasis in original). In the same manner, Justice Kennedy's concurrence confirmed the appropriateness of considering misconduct in granting a remedy:

> [B]oth employer and employee have reason to insist upon honesty in the resolution of disputes within the workplace itself. And this interest, too, is not beyond the Board's discretion to take into account in fashioning appropriate relief.

114 S. Ct. at 840 (Kennedy, J., concurring).

Accordingly, while the Court in *ABF Freight* deferred to the NLRB's authority to craft an appropriate remedy, this in no way detracts from the authority of courts to arrive at an appropriate remedy in a case involving after-acquired evidence.

C. The Equal Employment Opportunity Commission Also Has Espoused the Doctrine, But Then Reversed Its Position.

The Solicitor General now contends that backpay can be *limited*—and reinstatement and front pay can be defeated entirely—based on after-acquired evidence even where discrimination has occurrred. Br. at 23-25. The brief cites in support the *Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory* issued by the Equal Employment Opportunity Commission (EEOC), the federal agency having enforcement authority over the ADEA and Title VII. *Id.* at 26.

The Solicitor General's brief, however, fails to inform the Court that the Commission previously adopted the after-acquired evidence doctrine *in toto* as articulated in *Summers*, as a bar to all remedies. In March 1991, in the predecessor to the cited *Revised Enforcement Guide*, the EEOC issued guidance directing its own staff to take a strict *Summers* approach:

> Where a plaintiff proves by direct evidence that discrimination was the exclusive basis for an employment decision, or where (s)he establishes that discrimination was a motive for the action, and the employer cannot prove that a legitimate motive would

> have induced it to take the same action, then liability is established. At a minimum, the charging party is entitled to injunctive relief and attorney's fees. *However, in these circumstances, as in cases where discrimination is proved through circumstantial evidence, the employer may be able to limit other relief available to the plaintiff by showing that the after-the-fact lawful reasons would have justified the same action.*
>
> For example, if a charging party is terminated for discriminatory reasons, but the employer discovers afterwards that she stole from the company, and it has an absolute policy of firing anyone who commits theft, *then the employer would not be required to reinstate the charging party or to provide back pay. . . . See, e.g., Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700, 48 EPD ¶ 38,543 (10th Cir. 1988) (plaintiff entitled to no relief where evidence that he falsified numerous company records was discovered after termination); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 33 EPD ¶ 34,185 (4th Cir.), *cert. denied*, 469 U.S. 832, 35 EPD ¶ 34,663 (1984) (while the airline's policy of not processing applications of persons over age 35 for the position of flight officer was a violation of the ADEA, the airline was not compelled to grant full relief to the plaintiff, since the airline proved that had it considered plaintiff's application, it would not have hired him on the basis of other lawful reasons); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991, 994-5, 51 EPD ¶ 39,347 (D. Kan. 1989) (material omissions on plaintiff's employment application discovered after termination preclude relief on her Title VII claims).
>
> *Even if the charging party is not entitled to individual relief*, the Commission can lawfully seek relief for any other identifiable victims of the discrimination.

Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, EEOC Compl. Man.

(BNA) N:2129 at 2132-33 and n.17 (emphasis added).[16] Under this guidance, then the Commission would not have sought any individual relief on behalf of a charging party where after-acquired evidence of application fraud showed that termination was inevitable.[17]

The Commission issued new guidance on July 14, 1992, in which it changed its position on after-acquired evidence:

> [I]f the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be shielded from an order requiring it to reinstate the complainant or to pay the portion of back pay accruing after the date that the legitimate basis for the adverse action was discovered . . . .

Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, N-914.002, EEOC Compl. Man. (BNA) N:2135, N:2154.

The Commission gave no reason for its changed position, and did not even acknowledge that a change had occurrred. Because it has taken inconsistent positions, EEOC's current pronouncement is entitled to no deference. *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

Moreover, the consequences of the Commission's new approach before this Court are alarming. Under the Commission's revised position, an employee who would have

[16] The Commission's guidance notes that while it is intended to cover Title VII, "the same general principles apply to charges brought under the Age Discrimination in Employment Act." *Policy Guidance on Recent Developments in Disparate Treatment Theory*, N-915-063, EEOC Compl. Man. (BNA) N:2119.

[17] Given the existence of this guidance, it is unclear why the Commission, signatory to the Solicitor General's brief, would state now that "The court erred in *Summers* . . .", Brief of Solicitor General at 14 n.6, and that the doctrine "ignores and obstructs the strong public policy goals of the ADEA and Title VII." Brief of Solicitor General at 16.

been discharged for misconduct had the employer known of it nevertheless would receive backpay for a period of time solely because the wrongdoing fortuitously went undiscovered. For example, if an employee who is laid off in a force reduction sues for age discrimination, and during a later audit is found to have embezzled money from company accounts, under the Commission's theory that employee may be entitled to backpay up until the date the embezzlement is discovered. This view converts Title VII and ADEA remedies into a reward for successfully concealing misconduct rather than simply providing a remedy for discrimination.

D. Public Policy Supports Application of the After-Acquired Evidence Doctrine as a Bar To All Remedies.

The after-acquired evidence doctrine, as applied by the Fourth, Sixth, Seventh, Eighth and Tenth Circuits, serves the remedial "make whole" purpose of federal antidiscrimination legislation by placing claimants in the position they would have been in had the discriminatory conduct not occurred, but not rewarding them for actively engaging in wrongdoing. In after-acquired evidence cases, the claimant has committted actual misconduct—providing false answers to legitimate job application questions, theft of confidential company documents, or falsification of records.[18] To grant such an individual compensation such

[18] The fact of actual misconduct distinguishes cases in which the after-acquired evidence doctrine applies from the hypotheticals suggested by Petitioner. For example, Petitioner contends that under the doctrine as currently applied, "an employer could avoid liability in a hiring case by showing that, at the time it rejected a qualified black applicant on account of race, there was a better qualified white available for the position, even though the white had never applied for the job and the employer only learned of his or her existence long after the black applicant had been rejected." Brief of Petitioner at 25-26. On the contrary, the after-acquired evidence doctrine is not used absent some type of active misconduct on the part of the employee.

as backpay rewards the employee for managing to conceal his misconduct from the employer.

As one court has pointed out, "every falsehood has two components, the prevarication itself and the underlying fact misrepresented or omitted. Either component could give cause for immediate termination." *Baab v. AMR Servs. Corp.*, 811 F. Supp. 1246, 1260 (N.D. Ohio 1993). Employers thus have two significant interests in receiving truthful answers from their prospective employees—one regarding the applicant's qualifications for the job, and the other regarding their fundamental honesty as a character trait.

An employee who misappropriates confidential company documents and goes undiscovered for a period of time already has profited once by his own wrongdoing. The argument that the employee should receive an additional monetary remedy for the period in which the employer was unaware of the theft would be an additional windfall, also at the employer's expense, because the employee succeeded in keeping that wrongdoing secret. Accordingly, this Court should adopt the after-acquired evidence doctrine as a complete bar to remedies in employment discrimination cases.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the decision of the Sixth Circuit should be affirmed.

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